United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-2125

To be argued by
PIERCE O'DONNELL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2125

SAMUEL SANTORO,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR PETITIONER-APPELLANT

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BRIEF FOR PETITIONER-APPELLANT

ISSUES PRESENTED FOR REVIEW

1. Whether petitioner-appellant was denied his non-waivable right under Rule 43(a) of the Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments to be present at the commencement of his felony trial.

2. Whether the District Court erred in refusing to entertain, in a proceeding brought under 28 U.S.C. § 2255 to challenge a conviction stemming from a trial *in absentia*, questions which were raised and considered on appeal.

STATEMENT OF THE CASE

Petitioner-appellant (hereinafter "appellant") was convicted *in absentia* by a jury of multiple counts of violating the Extortionate Credit Transactions Act and of conspiracy to commit those offenses. Appellant pleaded guilty to failure to appear for his trial. On January 25, 1972, the Honorable Milton Pollack of the United States District Court for the Southern District of New York sentenced appellant to a term of 12 years' imprisonment: 12 years for the substantive offense and conspiracy violations and a concurrent five-year term for failure to appear.

Appellant's conviction was affirmed on appeal by a panel of this Court. *United States* v. *Tortora*, 464 F.2d 1202 (2d Cir.), *cert. denied sub nom. Santoro* v. *United States*, 409 U.S. 1063 (1972) (Douglas J., dissenting). On September 22, 1976, Judge Pollack, by order and without hearing, denied appellant's petition to vacate sentence. Joint Appendix at 95-96 (hereinafter "App."). In denying all relief, Judge Pollack ruled, *inter alia*, that a petition under 28 U.S.C. § 2255 cannot be employed to relitigate questions raised and decided on direct appeal from a conviction. App. 95. This appeal is taken from Judge Pollack's order denying appellant's petition to vacate sentence. Appellant is incarcerated at the United States Penitentiary in Leavenworth, Kansas.

STATEMENT OF FACTS

Appellant was indicted in January 1971, with four co-defendants, Joseph Chiaverini, Gene Genaro, John Tortora and Nicholas Ratteni, on extortion and conspiracy charges.[1] The indictment charged that Santoro and

[1] Unless otherwise indicated, the facts recited in this brief are taken from the earlier decision of a panel of this Court in *United States* v. *Tortora*, *supra*, 464 F.2d at 1204-07.

his co-defendants lent money to one Joseph Formiglia, although they had reasonable grounds to believe that the money would be used by Formiglia to make extortionate loans. The indictment also charged that the defendants had used extortionate means to collect the money loaned to Formiglia. Santoro pleaded not guilty and was released on bail. He retained Mr. Vincent Lanna to defend him.

Trial was originally set for April 15, 1971. In light of scheduling difficulties, a pre-trial conference was held on April 15 to determine a time when the court and the various lawyers would be available for trial. Mr. Peter Rosato, a partner of Mr. Lanna, appeared at that conference for Lanna, who was in trial on another matter. Rosato informed the court that Lanna had military obligations that would prevent him from appearing for trial during August. Counsel for the other defendants, however, agreed to begin trial on August 10. Judge Pollack set the case down for trial on that date and instructed Rosato that Santoro should make arrangements for substitute counsel if Lanna remained unavailable.

On July 21, 1971, Lanna wrote to Judge Pollack reiterating that he was still unavailable for trial on August 10. Lanna further explained that Santoro objected to a substitution of counsel and that he had instructed Santoro to appear on August 10. App. 11-12. Judge Pollack responded by letter on August 3, 1971, and informed Lanna that the trial would proceed as scheduled and that he was not excused from his obligations as an officer of the court. App. 13.

On August 5, 1971, Lanna again corresponded with Judge Pollack. This time he stated that his partner Rosato would appear with Santoro on August 10 in accordance with the court's directive. Lanna emphasized, however, that Santoro had not authorized Rosato to

represent him at trial. App. 14-15. Until shortly before the date set for trial, Lanna unsuccessfully attempted to reschedule his military obligations. App. 23.

Accompanied by Rosato, appellant appeared in court on August 10. Judge Pollack appointed Rosato and Mark Landsman to defend Santoro. App. 16-17. As the following colloquy shows, Rosato and Santoro expressed concern about going to trial in a serious case with inexperienced and unprepared defense counsel.

> "MR. ROSATO: . . . your Honor, I have never actively participated in this case, except—
>
> "THE COURT: This will be your opportunity to do so.
>
> "MR. ROSATO: I just wanted, insofar as passing, to say I have never actively participated in any part of this case, except as a leg man, so to speak, for Mr. Lanna, who happened to be on that day [April 15, 1971] on trial. He merely asked me to appear in his behalf. Whatever appearance I may have made in court has always been for Mr. Lanna and never on my own.
>
> * * * *
>
> "MR. ROSATO: . . . I might say that although I am a practicing attorney, I have only actually been in continuous criminal practice for one year, I have tried very, very few cases, criminal cases. I have never practiced in the Federal Court. I am totally unfamiliar with federal law and procedures. I am totally unfamiliar with the facts of this case and the crimes charged in this case. I have never been privy to any conversations, strategy or defense [conversations], with Mr. Santoro or with my partner or present when those conversations took place.
>
> "I have no knowledge of any defense, if any, that Mr. Santoro has in this case.
>
> "THE COURT: I am sure that your presence will be an aid and comfort to Mr. Santoro and my direction that you are assigned stands.

> "MR. ROSATO: . . . I thought you said that you concluded that I was adequate counsel, and I just wanted to remind the Court that I don't know what you base that on—
>
> * * * *
>
> "DEFENDANT SANTORO: Your Honor, I talked with Mr. Landsman, and he says he knows nothing of the case, he has no background or anything of the case. And I also talked to Mr. Rosato, and he seems to know nothing about it at all either. The only one who knows anything about it is Mr. Lanna." App. 17-19, 22.

Judge Pollack rejected these arguments and directed Rosato and Landsman to assume responsibility for appellant's defense. App. 26-27.

Two of appellant's co-defendants, Tortora and Chiaverini, did not appear on August 10. The trial court revoked bail and issued bench warrants for their arrest.[2] The trial did not commence, however, and the case was continued until August 16.

Between August 10 and August 16, Santoro's court-appointed lawyers conferred only once with him. Rosato and Landsman did not confer with appellant after August 12. App. 36-37.

Appellant did not appear for trial on August 16, and no explanation for his absence was offered.[3] With no

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[2] Tortora and Chiaverini were hospitalized for bronchitis and back pains, respectively. Prior to the commencement of trial on August 16, Judge Pollack found that these defendants' voluntary hospitalization was an insufficient ground to delay the trial. Both defendants, the trial court found, were competent to stand trial.

[3] One of Santoro's defense counsel, Rosato, told the court that Santoro had telephoned him on the evening of August 15 to arrange for Rosato to drive him to court the next morning. When Rosato arrived to pick him up, Santoro was not at his apartment. Santoro's wife related that she had seen him on August 15. App. 37-39.

evidence to the contrary,[4] Judge Pollack found that the trial had commenced on August 10,[5] that Santoro had voluntarily and knowingly absented himself from the trial, and that there was no reason not to proceed with the trial with Santoro as a defendant. Stating that they were unable to defend appellant in his absence, Santoro's counsel moved for a continuance or severance. App. 37-44, 47-48. The motion was denied. Jurors were selected, and the Government opened its case.[6]

The prosecution of appellant was complex. The trial lasted from August 16 through August 24. While numer-

[4] Counsel for the government reported to Judge Pollack that he had "heard a rumor that there might be a contract out for Mr. Santoro's life." App. 39.

[5] On appeal the panel did not rely upon the District Court's finding that the trial began on August 10. On the contrary, the panel recognized that a jury trial cannot commence until at least jury selection has begun. *United States* v. *Tortora*, *supra*, 464 F.2d at 1208-09. It is undisputed that Santoro was not present on August 16 when jury selection began.

[6] The Government may have had some reservations about whether the case against Santoro could proceed in his absence.

> "THE COURT: . . . There is no reason why, if the government so desires and believes that it is well advised to do to proceed with the impaneling of the jury with Mr. Santoro's counsel here present and participating, and in the meantime such search as may be conducted by the authorities can take place.
>
> "What is the government's disposition? We just can't sit here indefinitely in these circumstances.
>
> "MR. FRIEDMAN [counsel for the Government]: Your Honor, may we have a few minutes to research the law in the matter of—
>
> "THE COURT: Your choice now is either to move for a discontinuance, a severance or to proceed.
>
> "MR. FRIEDMAN: Yes, sir.
>
> "Your Honor, the government wishes to proceed.
>
> "Will counsel for the defendant Santoro consent to the picking of the jury in the absence of the defendant?
>
> "MR. LANDSMAN: Your Honor, I don't think we can consent to something like that. He is charged with a felony here." App. 40-41.

ous witnesses testified, the Government's case consisted mainly of Formiglia's testimony and garbled recordings of taped conversations among Formiglia, Tortora and Santoro. The Government considered Santoro a central figure in the case. App. 28.

Rosato and Landsman renewed their motion to sever several times during the trial. When the Government turned over voluminous transcripts of conversations between Formiglia and Santoro, defense counsel emphasized once more that their recent appointment to the case, complicated by their client's absence, prevented them from properly analyzing the Jencks Act materials[7] and effectively cross-examining witnesses. In light of these restrictions, counsel argued that they could not provide Santoro with an adequate defense. App. 44-45.

At the close of the Government's case, the Court dismissed the indictment against Genaro for insufficient evidence. Two other defendants presented witnesses on their behalf. Rosato and Landsman offered no defense for Santoro. The jury acquitted Chiaverini and Ratteni but convicted Tortoro and Santoro, who was still *in absentia*. A motion by Santoro's counsel to set aside the verdict was denied. App. 51.

At sentencing on Januray 25, 1972, Santoro explained through counsel that he had fled because he feared relying on unprepared counsel to defend him against the serious felony charges he faced.[8] A renewed motion to

[7] The 3500 material apparently named Santoro on almost every page. App. 44-45.

[8] "MR. ROSATO: . . . [A]t the time of his disappearance [, Santoro] felt somewhat panicked, felt that he was being compelled to face a most serious charge where he was confronted with perhaps imprisonment for the rest of his life, in effect, and for that reason he was being compelled to trial without counsel that he felt was the only he had confidence in, was properly prepared and qualified to defend him." App. 51.

set aside the verdict because of appellant's absence from trial was denied. Judge Pollack then imposed a 12-year sentence. At no time was an evidentiary hearing held on the voluntariness of appellant's absence.

On direct appeal, a panel of this Court affirmed Santoro's conviction. The panel held that "a defendant may waive his right to insist that his trial begin only in his presence." *United States* v. *Tortora, supra*, 464 F.2d at 1208. In reaching this conclusion, the panel reasoned that, although no federal court and, with one exception,[9] no state court had found a waiver if the accused was not present for the impanelment of the jury, "[l]ike any constitutional guarantee, the defendant's right to be present may be waived." *Id.* (citations omitted). The panel further noted that appellant "had been adequately apprised that he was to appear in court *on August 16* and that *his trial would commence on that day*." 464 F.2d at 1209 (emphasis supplied).[10]

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[9] At the time of the panel's decision, the United States Supreme Court had decided to review a decision of the Arizona Supreme Court holding that a defendant convicted *in absentia* of a felony and sentenced to five years' imprisonment had made a knowing and intelligent waiver of his right to confrontation and right to be present at the trial of his case. *See State* v. *Tacon*, 107 Ariz. 353, 488 P.2d 973 (1971), *cert. granted*, 407 U.S. 909 (1972). After the panel's decision, however, the Supreme Court dismissed the writ of certiorari as improvidently granted. *Tacon* v. *Arizona*, 410 U.S. 351 (1973) (Douglas, Brennan and Marshall, JJ., dissenting).

[10] The panel also rejected Santoro's claim that he was deprived of his Sixth Amendment right to counsel of his choice. 464 F.2d at 1210.

In his petition to vacate sentence filed in the court below, appellant claimed that he was denied his Sixth Amendment right to effective assistance of counsel as a result of both the belated appointment of Rosato and Landsman and Rosato's inexperience. App. 59-64. Judge Pollack rejected this claim, stating:

> "The Second Circuit has time and again noted that to assume constitutional proportions stringent standards are

(footnote continued)

SUMMARY OF ARGUMENT

Appellant's trial *in absentia* strikes at the heart of a cluster of precious rights afforded the criminally accused, including the due process of law and jury trial guarantees and the right of confrontation. A defendant's historic right to be present at the commencement of a felony trial and at every stage thereafter can be traced to the early Anglo-Saxon common law experience. This fundamental protection was enshrined in the Bill of Rights and has been codified in Rule 43 of the Federal Rules of Criminal Procedure.

At common law in both England and the United States, the presence of the accused at a felony trial was mandatory. Numerous decisions of the United States Supreme Court and federal and state courts held that "it was not within the power of the accused or his counsel to dispense with the . . . requirement as to his presence at trial." *Hopt* v. *Utah*, 110 U.S. 574, 579 (1884). Prior to the decision of a panel of this Court in *United States* v. *Tortora*, 464 F.2d 1202 (2d Cir.), *cert. denied sub nom. Santoro* v. *United States*, 409 U.S. 1063 (1972) (Douglas, J., dissenting), no federal court had abandoned the critical requirement that a trial must begin in the presence of a felony defendant.

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[10] (continued)

applied to claims of inadequacy of counsel. *United States* v. *Joyce*, —— F.2d ——, Dkt. No. 76-1182 (2d Cir. Sept. 20, 1976). Nothing before this Court or in the record indicated that the team of attorneys provided for Santoro represented ineffective assistance or that a constitutional right was deprived." App. 95.

While appellant does not press this ineffective assistance of counsel claim as such in this appeal, it is important to bear in mind that the accused's right not to be tried *in absentia* in felony prosecutions was historically designed to preserve, *inter alia*, the accused's Sixth Amendment guarantee of the effective assistance of counsel. *See* note 31, *infra*.

The plain language of Rule 43 dictates that a felony trial may not go forward unless the accused is present at the impaneling of the jury. It is uncontroverted that appellant was not present at the selection of the jury or at any time thereafter. Appellant's conviction is therefore null and void.

Any doubts about the requirements of Rule 43 are conclusively resolved by the legislative history of the rule as originally promulgated, subsequently enacted and later modified. The draftsmen of Rule 43 intended to codify existing law and to make clear that the "defendant [in felony cases] has no power of waiver" and that the trial may not begin in his absence unless he "has first voluntarily submitted himself to the jurisdiction of the court by appearance at arraignment and at the commencement of the trial." 8B *Moore's Federal Practice* ¶ 43.02[2] at 43-9, 43-10 to 43-11 (2d ed. 1976) (footnotes omitted). *Tortora* reads out of Rule 43 the careful distinction drawn between the defendant's ability to waive his right of presence at the commencement of trial in felony as opposed to misdemeanor prosecutions.

The prior decision by a panel of this Court does not operate as a conclusive bar to a reexamination of appellant's trial *in absentia* claim. The inflexible doctrine of *res judicata* is foreign to traditional notions governing the availability of relief under 28 U.S.C. § 2255. In light of *Tortora*'s sharp departure from long-standing law and practice and the apparent uncertainty in this Circuit about the state of the law in this important area, this case presents exceptional circumstances warranting a reconsideration of the issues raised by this appeal. Moreover, the ends of justice dictate that a defendant tried *in absentia*, convicted of serious felony charges and sentenced to a 12-year prison term may call upon this Court to consider anew the compelling claim for relief in his petition to vacate sentence.

ARGUMENT

I.

APPELLANT'S FELONY TRIAL *IN ABSENTIA* VIOLATED HIS NONWAIVABLE RIGHT UNDER RULE 43(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THE FIFTH AND SIXTH AMENDMENTS TO BE PRESENT AT THE COMMENCEMENT OF HIS TRIAL.

In the constellation of rights of the criminally accused, no guarantee is more cherished than the defendant's right to be present at his trial. Trial by jury, Blackstone reminds us, was

> "the grand bulwark of [every Englishman's] liberties. . . . Our law has . . . wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown." 4 W. Blackstone, *Commentaries* 349 (W.D. Lewis ed. 1900).

The Founding Fathers, steeped in the common-law tradition of England and well versed in Blackstone,[11] gave expression to the Anglo-Saxon experience with trial by jury in Article III, Section 2, Clause 3, of the United States Constitution [12] and the Fifth [13] and Sixth [14] Amend-

[11] *See* A. Sutherland, *Constitutionalism in America: Origin and Evaluation of Its Fundamental Ideas* 124-25 (1965); W. Hurst, *The Growth of the American Law: The Law Makers* 257 (1950); *Schick* v. *United States*, 195 U.S. 65, 69 (1904).

[12] "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ."

[13] "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

[14] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been com-

(footnote continued)

ments.[15] "Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'" *Thompson* v. *Utah*, 170 U.S. 343, 349-50 (1898), quoting 2 J. Story, *Commentaries on the Constitution of the United States* § 1779 (1833).

An integral aspect of the jury trial guarantee was the right of confrontation[16] and the corresponding right to be present at trial and to meet face-to-face with adverse witnesses.[17] "One of the most basic of the rights guaranteed by the Confrontation Clause [of the Sixth Amendment] is the accused's right to be present in the courtroom at every stage of his trial." *Illinois* v. *Allen*, 397 U.S. 337, 338 (1970). This right is "scarcely less important to the accused than the right of trial itself." *Diaz* v. *United States*, 223 U.S. 442, 455 (1912).

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[14] (continued)

mitted, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

[15] The jury trial right in criminal cases was also guaranteed in the constitutions of the original 13 States and in the constitution of every State entering the Union thereafter. *Duncan* v. *Louisiana*, 391 U.S. 145, 153 (1968).

[16] The right of confrontation remains "[o]ne of the fundamental guarantees of life and liberty . . . long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the Constitutions of most if not of all the States composing the Union." *Kirby* v. *United States*, 174 U.S. 47, 55, 56 (1899).

[17] *Tacon* v. *Arizona*, *supra*, 410 U.S. at 353 (Douglas, J., dissenting); *see* J. G. Cook, *Constitutional Rights of the Accused: Trial Rights* § 5 at 18 (1974); *Fina* v. *United States*, 46 F.2d 643 (10th Cir. 1931).

Appellant was convicted on a sixteen-count felony indictment without being present at any stage of the trial. He has already served almost five years of his 12-year prison sentence. Without conducting a hearing and during his absence, the trial court held that appellant had waived his right to be present at trial. The decision to proceed with the trial in his absence was a violation of Santoro's fundamental right to be present at the commencement of his trial. Under Rule 43(a) of the Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments, appellant's right of presence at the outset of his trial was mandatory and could not be waived. In the interests of justice and to correct a manifest error, we urge this Court to overrule *United States* v. *Tortora*, *supra*.

A.

At Common Law The Accused Could Not Be Tried *In Absentia* On A Felony Charge.

The historical underpinnings "'of the ban against trials *in absentia*'"[18] can be traced to the earliest experiences of the English people with a legal system for adjudicating guilt or innocence. "The presence of the defendant at his own trial has long been a valued part of the Anglo-Saxon criminal justice system." Cohen, *Trial In Absentia Re-examined*, 40 Tenn.L.Rev. 155, 167 (1973). This insistence on the accused's presence was also common to Continental legal systems. Indeed,

> "the criminal law of almost every nation begins with the accusatory system, and a pronounced characteristic of this is the absence of any procedure by which to condemn an accused who fails to ap-

[18] *Drope* v. *Missouri*, 420 U.S. 162, 171 (1975), quoting Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U.Pa.L.Rev. 832, 834 (1960).

> pear. . . . The reason for this principle must be found, if at all, in a rather sound conception of justice even among the early peoples." Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*, 16 Colum.L.Rev. 18, 19 (1916) (footnote omitted).

It was the judgment of the common law that no person should be put to death, or imprisoned, or suffer forfeiture of property unless he had personally participated in the trial. For many, including later American courts, the accused's presence was viewed as jurisdictional.[19]

The English common law early recognized a distinction between the power of a court to proceed with a trial in felony and misdemeanor cases. Chitty summarizes the rule:

> "Although we have seen that no one can be convicted of a felony in his absence, and at the assizes and sessions, the defendant must appear in person, before plea, it is otherwise in the King's Bench in the case of misdemeanors; for the defendant may in that court, when the crime is inferior to felony, appear by attorney." 1 J. Chitty, *A Practical Treatise on the Criminal Law* 411 (J.C. Perkins ed. 1847).

A traditionally important part of the criminal trial was the actual face-to-face confrontation between the accused and the jury as the court clerk read the indictment. *Id.* at 554. Likewise, at the conclusion of the prosecution's

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[19] *See* Cohen, *Trial in Absentia Re-examined*, 40 Tenn.L.Rev. 155, 168 n.84 (1973); 4 W. Blackstone, *Commentaries* 361 n.54 (W.D. Lewis ed. 1900).

> "At common law, it seems that a valid judgment could not be predicated upon a verdict rendered in the absence of the defendant. Apparently, such a practice would savor of the characteristic of a judgment by default which has always been obnoxious to the criminal law." Goldin, *The Presence of the Defendant at the Rendition of the Verdict in Felony Cases*, 16 Colum.L.Rev. 18, 21 (1916).

case, and before the examination of his own witnesses, the accused in most felony cases was "entitled to address the jury, whose duty, as well as that of the court, it is, to attend with patience to what he may think fit to offer." *Id.* at 623. At the time of pronouncing the sentence, where death or imprisonment might be imposed, it was "absolutely necessary that [the defendant] should be personally before the court . . . ." *Id.* at 693; *see also Ball* v. *United States*, 140 U.S. 118, 129 (1891).

This dichotomy between felony and misdemeanor prosecutions in terms of the required presence of the accused was carried over into the common and statutory law of this country. *See* 5 *Wharton's Criminal Law and Procedure* § 2007 at 143-44 (R.A. Anderson ed. 1957); Cohen, *Trial in Absentia Re-examined*, 40 Tenn.L.Rev. 155, 157-61 (1973). A substantial body of authority, "founded in the justice and wisdom of the common law,"[20] also supported the view that the felony defendant could not waive his right to be present at trial. This was true in England, *see Rex* v. *Streek*, 2 Car. & P. 413 (1826), as well as many American state courts. *See* Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*, 16 Colum.L.Rev. 18, 25-26 n.32 (1916). That the accused could not waive his right of presence has long been the rule in federal courts. As the Supreme Court ruled in *Hopt* v. *Utah*, 110 U.S. 574, 579 (1884):

> "We are of the opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial . . . . [T]he legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial

[20] *Andrews* v. *State*, 2 Snead (Tenn.) 550, 553 (1855) (defendant escaped as the jury was bringing in its verdict).

> rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution." *See also Lewis* v. *United States*, 146 U.S. 370, 372 (1892); *Schwab* v. *Berggren*, 143 U.S. 442, 448 (1892).

Whatever changes in the law may have been introduced by decisions finding a valid waiver of the felony defendant's right of presence under certain circumstances,[21] there remained "the prevailing rule . . . that if, *after the trial has begun in his presence*, [the accused] voluntarily absents himself, this . . . operates as a waiver of his right to be present." *Diaz* v. *United States*, *supra*, 223 U.S. at 455 (emphasis supplied). *See* Cohen, *Trial in Absentia Re-examined*, 40 Tenn.L.Rev. 155, 159 (1973). Until this Court's decision in *United States* v. *Tortora*, *supra*, no federal court had abandoned the criti-

[21] In *Howard* v. *Kentucky*, 200 U.S. 164 (1906), the Supreme Court affirmed a murder conviction despite the accused's absence when the trial judge dismissed a juror. An occasional absence during the trial, the Court reasoned, will not vitiate a conviction so long as substantial rights are not jeopardized.

In *Frank* v. *Mangum*, 237 U.S. 309 (1915), a capital case, the defense counsel, acting without express authorization, waived his client's presence at the rendition of verdict. The defendant had been otherwise present during the trial. The Court noted:

> "The presence of the prisoner when the verdict is rendered is not so essential a part of the hearing that a rule of practice permitting the accused to waive it and holding him bound by the waiver amounts to a deprivation of 'due process of law.'" 237 U.S. at 343.

Likewise, in *Valdez* v. *United States*, 244 U.S. 432 (1917), the Court sustained a capital conviction in which the defendant was not present at a view of the scene of the crime. The defendant had been in custody during trial and was present at the commencement of the proceedings.

It should be noted that the English still require the presence of the accused for offenses punishable by more than three months' incarceration. *See* R. Arguile, *Criminal Procedure* 136 (1969).

cal requirement that a trial must begin in the presence of a felony defendant.[22]

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[22] Citing *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934), *Tortora* noted that "[l]ike any constitutional guarantee, the defendant's right to be present at trial may be waived." 464 F.2d at 1208. *Tortora's* reliance on *Snyder* was misplaced. *Snyder* held simply that the jury's view of the scene of a crime is not a part of the trial at which a defendant must be present. *See* note 21, *supra*. Dictum in *Snyder* that a defendant may waive his right to be present is, of course, correct as to most stages of the trial. That statement, however, was not directed to the right of the accused to be present at the commencement of trial and certainly was not intended to overrule the well-established prior body of law making an accused's presence at that stage mandatory.

After the decision in *Tortora*, two other circuits have permitted trials to begin in the defendant's absence. *See United States* v. *Peterson*, 524 F.2d 167, 182-86 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976); *Government of Virgin Islands* v. *Brown*, 507 F.2d 186 (3d Cir. 1975). In *Brown*, the felony defendant appeared after the voir dire examination of prospective jurors but before the exercise of peremptory challenges. Upon his arrival, Brown did not object to the veniremen remaining after the voir dire examination. He was present for the duration of the trial. The Third Circuit affirmed his conviction.

The trial in *Peterson* involved a multi-defendant prosecution for bank robbery and conspiracy to commit bank robbery. One defendant did not appear for trial and the District Court, relying upon *Tortora*, proceeded with the trial in his absence. Citing *Brown* and *Tortora*, the Fourth Circuit affirmed the conviction.

Two days after *Tortora*, the District of Columbia Court of Appeals reversed a felony conviction of a defendant who was tried *in absentia*. *See Campbell* v. *United States*, 295 A.2d 498, 500 (App.D.C. 1972). Relying upon the District of Columbia's local rule corresponding almost verbatim to Rule 43(a) of the Federal Rules of Criminal Procedure, the Court of Appeals held that "[i]t is mandatory that the accused be present at the beginning stage of the trial." 295 A.2d at 500. On the Government's petition for rehearing, relying on *Tortora*, the District of Columbia Court of Appeals adhered to its original reversal of the conviction. Assuming only for the sake of the petition that *Tortora* was sound law, the Court of Appeals noted that on the facts of the case before it and in the absence of extraordinary circumstances, it would have been an abuse of discretion for the trial court to proceed without the defendant. 295 A.2d at 562-03. The opinion on the Government's petition for rehearing, we submit, cannot be read as an unqualified endorsement of *Tortora*.

B.

The Plain Language And Legislative History Of Rule 43(a) Confirm That A Felony Defendant May Not Be Tried *In Absentia*.

At the time of appellant's trial, Rule 43 of the Federal Rules of Criminal Procedure provided in pertinent part:[23]

> "The defendant *shall be present* at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence *after the trial has been commenced in his presence* shall not prevent continuing the trial to and including the return of the verdict." (Emphasis supplied.)

The unmistakable import of Rule 43 is that in non-capital felony cases,[24] the accused's presence at certain

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[23] Rule 43 was amended in 1975 to reflect the Supreme Court's holding in *Illinois* v. *Allen*, 397 U.S. 337 (1970), that after proper warning a contumacious defendant may lose his right to remain in the courtroom during his trial. *See* Federal Rules of Criminal Procedure Amendments Act of 1975, §§ 2, 3(35), Pub. L. No. 94-64, 89 Stat. 370, 376. The only changes to the portion of the text of Rule 43 quoted above are editorial in nature, and are not substantive modifications. *See* Advisory Committee Notes to 1975 Amendment, 18 U.S.C.A. Rule 43. Thus, present Rule 43(b) reads:

> "The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, *initially present*,
>
> "(1) voluntarily absents himself *after the trial has commenced* (whether or not he has been informed by the court of his obligation to remain during the trial), or
>
> "(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom." (Emphasis supplied.)

[24] Rule 43(c)(2) provides that a defendant in a misdemeanor prosecution may waive his presence at any stage of the proceed-

(footnote continued)

proceedings, including arraignment, impaneling of the jury and the return of verdict, is mandatory and cannot be waived by him. Moreover, the defendant's trial may not go forward, even if his absence is voluntary, if his "trial has [not] commenced in his presence . . . ." For purposes of Rule 43, a trial cannot begin until at least the process of jury selection has begun. *See Hopt* v. *Utah*, *supra*, 110 U.S. at 578; *Campbell* v. *United States*, *supra*, 295 A.2d at 499-500; Cohen, *Trial In Absentia Re-examined*, 40 Tenn.L.Rev. 155, 162-63 (1973). The panel in the first appeal of this case apparently agreed with this view. *United States* v. *Tortora*, *supra*, 464 F.2d at 1208-09. The selection of appellant's jury did not begin until August 16, 1971, and it is undisputed that he was not present on that date or at any time thereafter.

The plain language of Rule 43(a) therefore conclusively establishes that the prosecution of the felony charges against appellant should not have begun in his absence. Appellant's conviction, obtained in his absence, is null and void.

Even if the meaning of Rule 43 were unclear [25]—which it is not—the history of the drafting of Rule 43 dispels any doubt as to its requirements. The Advisory Committee on the Rules of Criminal Procedure, in its 1943 Notes on the Preliminary Draft of Rule 38, which

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[24] (continued)

ings. The presence of this subsection in the rule reinforces the distinction that must be drawn between the status of felony and misdemeanor defendants. Otherwise, Rule 43(c)(2) would be mere surplusage, since under the panel's view in *Tortora*, the right to be present at commencement of trial is waivable by a felony defendant.

[25] Where the terms of a rule or statute are unambiguous, no need exists to resort to legislative history to ascertain its meaning. *Wilbur* v. *United States*, 284 U.S. 231, 237 (1931); *Manufacturers Hanover Trust Co.* v. *Commissioner of Internal Revenue*, 431 F.2d 664, 668 (2d Cir. 1970).

was subsequently enacted as Rule 43, explains the rule as follows:

> "The second sentence permits continuance of trials both in felony cases if the crime is not punishable by death and in misdemeanor cases when the defendant by his voluntary act absents himself after the commencement of the trial. *Under this provision the defendant is required to be present at arraignment and plea and the trial must be begun in his presence.*" (Emphasis supplied.)

In commenting on the proposed rule, James B. McNally, United States Attorney for the Southern District of New York, expressed the view that trial *in absentia* "is not conducive to wholesome respect for the federal judicial system." 3 Supreme Court of the United States, *Comments, Recommendations and Suggestions Concerning the Proposed Federal Rules of Criminal Procedure* 178-79 (1944) [hereinafter "*Comments*"]. Another commentator, Judge A. Lee Wyman, observed that the defendant's presence is necessary to preserve the "importance of a criminal trial" and the "dignity" of the judicial process. 1 *Comments* 25[illegible] (1943). Judge John B. Sanborn of the United States Court of Appeals for the Eighth Circuit remarked:

> "I think it would be inadvisable to conduct criminal trials in the absence of the defendant. *That has never been the practice*, and, whether the defendant wants to attend the trial or not, I think he should be compelled to be present. If, *during the trial*, he disappears, there is, of course, no reason why the trial should not proceed without him." 1 *Comments* 236 (1943) (emphasis supplied).

The Advisory Committee Notes accompanying Rule 43, as eventually promulgated two years later, explain the origin and significance of the rule in the same terms as the Notes on the Preliminary Draft of Rule 38:

> "The second sentence of the rule is a restatement of existing law that, except in capital cases, the defendant may not defeat the proceedings by voluntarily absenting himself *after the trial has been commenced in his presence*. *Diaz* v. *United States*, 32 S.Ct. 250, 223 U.S. 442, 455, 56 L.Ed. 500, Ann. Cas. 1913C, 1138; *United States* v. *Noble*, 294 F. 689 (D. Mont.)—affirmed, 300 F. 689, C.C.A. 9th; *United States* v. *Barracota*, 45 F.Supp. 38, S.D. N.Y.; *United States* v. *Vassalo*, 52 F.2d 699, E.D. Mich." (Emphasis supplied.)

Appellant's reading of Rule 43 corresponds with the interpretation of several commentators. Professor Moore, for example, reaches the following conclusions about "the clear implication of paragraphs (a) and (b) of Rule 43":

> "In felony cases, presence at *arraignment*, at the time of *plea*, at *commencement* of the trial, and at imposition of *sentence* is mandatory—i.e., defendant has no power of waiver. In felony and misdemeanor cases, presence at the *trial* may be waived by defendant's voluntary absence after the trial has been commenced in his presence. . . .
>
> "[T]he Rule provides that in all cases defendant may be tried 'in absentia' if he absconds, or otherwise *willfully* makes himself unavailable, after the trial has been commenced. This is in the nature of an *implied* waiver of presence. The provision is not operative, however, unless defendant has first voluntarily submitted himself to the jurisdiction of the court by appearance at arraignment and at the commencement of the trial." 8B *Moore's Federal Practice* ¶ 43.02[2] at 43-9, 43-10 to 43-11 (2d ed. 1976) (footnotes omitted); *see also* Cohen, *Trial In Absentia Re-examined*, 40 Tenn.L.Rev. 155, 158-59 (1973).

The prior panel decision in this case circumvented the clear mandate of Rule 43 by finding, contrary to the

overwhelming weight of authority,[26] that "[l]ike any constitutional guarantee, the defendant's right to be present at trial may be waived." *United States* v. *Tortora*, *supra*, 464 F.2d at 1208. *See* note 22, *supra*. As we have shown, this observation is fundamentally unsound. A few examples of the application of this reasoning to other aspects of Rule 43 show the danger of its logical consequences.

Elsewhere in its opinion, the panel in *Tortora* indicated that its concern was not so much over the concept of a nonwaivable right, but the stage of the proceedings at which the presence of the defendant is required. The panel apparently had no disagreement, for example, with the requirement of Rule 43 that the defendant must be present in court to plead to the charges against him. *Id.* at 1209. If under proper circumstances, however, the accused may waive the requirement that he be present at the commencement of trial, the right to be present at time of arraignment or sentencing presumably may also be waived. Certainly, nothing in the language or logic of *Tortora* would point to a different conclusion on the issue of waiver.

Rule 43 also provides, by implication, that a defendant charged with a capital crime has a nonwaivable right to be present at every stage of his trial. Presumably, under the rule announced in *Tortora*, this right is also waivable. The application of this flawed reasoning to other portions of Rule 43 would thus render meaningless

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[26] It is significant that *Tortora* discusses none of the legislative history of Rule 43, with the exception of a passing reference in a footnote to the Advisory Committee's comment that Rule 43 is "no more than a restatement of the defendant's constitutional rights. . . ." 464 F.2d at 1210 n.6. That the panel misread the substantial evidence about the origins and purpose of Rule 43 is evident from the further observation in the same passage and without citation of authority that the Rule's "protections can be waived by the defendant's conduct." *Id.*

the careful distinctions drawn by that Rule. Surely, no such result was intended by the draftsmen of Rule 43.

Assuming that *Tortora* correctly held that the accused may waive his *constitutional* right of presence at the beginning of trial, the decision ignores the crucial distinction between rights mandated by the Constitution and the power of the legislature to extend those rights by statute.[27] Thus, in *Barker* v. *Wingo*, 407 U.S. 514 (1972), the Supreme Court held that, under the circumstances of the case before it, a five-year delay after indictment in bringing the defendant to trial did not violate his constitutional right to a speedy trial. Congress has since provided in the Speedy Trial Act, however, that all federal criminal defendants must eventually be brought to trial within sixty days of arraignment. 18 U.S.C. § 3161. Likewise, the right to counsel accorded by the Supreme Court to persons facing parole or probation revocation in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), and *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), has been expanded by Congress in the Parole Commission and Reorganization Act. *See* 18 U.S.C. §§ 4201-18, Pub. L. No. 94-233, 90 Stat. 219.

Various states have enacted statutes designed to require the presence of the defendant at all or designated portions of the proceedings against him. See *Cohen, Trial In Absentia Re-examined*, 40 Tenn.L.Rev. 155, 157-61 (1973). Such statutes have been scrupulously enforced by the courts. In *Hopt* v. *Utah*, *supra*, for example, the Supreme Court was required to construe a provision of the criminal code of procedure of the Territory of Utah

[27] Likewise, in the exercise of its criminal rule-making powers under the Rules Enabling Act, 18 U.S.C. § 3771, as well as its general supervisory authority over the federal courts, the Supreme Court, in the interests of fairness and decency, can expand the rights of the criminally accused. *See, e.g., Ridau* v. *Louisiana*, 373 U.S. 723, 727 (1963) (Clark, J., dissenting); *Marshall* v. *United States*, 360 U.S. 310 (1959); *McNabb* v. *United States*, 318 U.S. 332 (1943).

which required, in terms similar to Rule 43 of the Federal Rules of Criminal Procedure, that a defendant, if tried for a felony, must be personally present at his trial. At his felony trial, defendant Hopt challenged certain jurors for cause, but the challenge was ultimately decided out of his presence. Hopt did not agree to this procedure, continued with trial, and was convicted. The Supreme Court reversed his conviction, holding that under Utah law the right of the defendant to be present at each stage of his trial was mandatory and could not be waived. 110 U.S. at 579.

Similarly, Virginia has long held as a matter of state constitutional law that the accused must be present in person at any proceeding which might affect his interest. "This right to be present at every stage of the trial is considered so fundamental that it may not be waived." *Ingram* v. *Peyton*, 367 F.2d 933, 937 (4th Cir. 1966) (citation omitted) (defendant's presence at hearing on motion for new trial).

The statutes involved in these decisions are substantially similar in terms to Rule 43.[28] Each case construing such a statute recognizes that where the statute provides that a defendant "must" or "shall" be present at a specified stage of trial, no waiver is possible. The same result is required under Rule 43.[29] Only by legerdemain can the mandatory presence of the accused at the commencement of a felony trial be read out of Rule

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[28] Rule 43 has been adopted in whole or part by statutes or court rules in at least eleven states and the District of Columbia. *See* Cohen, *Trial In Absentia Re-examined*, 40 Tenn.L.Rev. 155, 158 (1973); *Campbell* v. *United States*, *supra*.

[29] Indeed, the District Court recognized that Santoro's presence at the commencement of trial was required, but found that requirement satisfied by his presence on August 10, when the case was called for trial. *See* note 5, *supra*, and accompanying text. Of course, since no proceedings were conducted on this date, Santoro's trial did not commence until August 16, when the jury was impaneled. *See* page 19, *supra*.

43. Only the Supreme Court in its rule-making capacity or the Congress can so amend Rule 43.

The requirements of Rule 43, and the parallel guarantees of the Fifth and Sixth Amendments, reflect centuries of common law experience.[30] They have a sound basis in public policy: to assure beyond any doubt that an accused is fully aware the trial of the serious charges against him has begun and to eliminate any possible confusion in the accused's mind about his rights and obligations or the possible serious consequences of his acts.

The countervailing interest of society in the orderly administration of justice is not jeopardized by not trying *in absentia* the nonappearing felony defendant. Congress has provided the federal bench with an impressive array of powers to impose substantial penalties on a defaulting defendant. A trial court is not

> "helpless when a defendant does not appear at the beginning of the trial as directed. The proper exercise of its contempt power, after appropriate factual inquiry, appears in light of Rule 43 to be a prescribed method of punishing a defendant who fails to appear for trial. *See* 18 U.S.C. § 402 (1970). . . . In addition, one who willfully fails to appear as required is subject to prosecution. . . ." *Campbell* v. *United States*, *supra*, 295 A.2d at 500 n.8.

Thus, in this case, appellant pleaded guilty to a charge of failure to appear under 18 U.S.C. § 3150 and received the five-year maximum prison term for that offense.

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[30] Justice Cardozo recognized that, while a rule may not always appear to furnish the best or only resolution of a problem,

> "the juristic philosophy of the common law is at bottom the philosophy of pragmatism. Its truth is relative, not absolute. The rule that functions well produces a title deed to recognition." B. Cardozo, *The Nature of the Judicial Process* in M. Hall (ed.), *Selected Writings of Benjamin Cardozo* 149 (1947).

Of course, once the accused has been apprehended, the Government may still bring him to trial for the original charges as well as for failure to appear. Any inconvenience in proceeding separately against the absent defendant severed from a multi-defendant prosecution, or against the lone accused whose absence resulted in a continuance, cannot justify the evisceration of the fundamental protections safeguarded by the Fifth and Sixth Amendments and codified in Rule 43(a). As the Supreme Court has stated, fundamental constitutional rights "cannot be measured in minutes and hours or dollars and cents." *Taylor* v. *Hayes*, 418 U.S. 488, 500 (1974).

The requirement that the accused be present at the commencement of his felony trial was totally ignored in this case. The deprivation of this basic right can never be considered harmless. *See United States* v. *Crutcher*, 405 F.2d 239, 244 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969) (defendant's right to be present during jury selection cannot be deemed harmless error).[33] Appellant's conviction after a trial at

[33] Indeed, in this case, it defies belief to suggest that Santoro's trial *in absentia* might be harmless error. Appellant claimed in the court below that under any standard, he was denied effective assistance of counsel by virtue of the eleventh-hour appointment of Rosato and Landsman and Rosato's inexperience. App. 59-64. While this claim is not asserted on appeal as an independent ground for vacating appellant's conviction, *see* note 10, *supra*, the Court is urged to bear in mind the intimate relationship between the right to effective assistance of counsel, *see Powell* v. *Alabama*, 287 U.S. 45 (1932), and the accused's presence at trial. *Cf. Goders* v. *United States*, 96 S.Ct. 1330 (1976).

Moreover, regardless of the reason for Lanna's inability to represent appellant at trial, it is important to consider that the appointment of completely uninformed and unprepared substitute counsel six days before this serious felony trial raises substantial questions about the ability of Rosato and Landsman, no matter how diligent they may have been, to mount a competent defense. *See Twiford* v. *Peyton*, 372 F.2d 670, 673 (4th Cir. 1967) (a showing of belated appointment or lack of preparation of counsel constitutes a *prima facie* case of ineffective assistance of counsel). *Accord, United*

(footnote continued)

which he was never present is not authorized by law and must be vacated.[32]

II.

APPELLANT MAY CHALLENGE IN A PROCEEDING BROUGHT UNDER 28 U.S.C. § 2255 HIS TRIAL *IN ABSENTIA* DESPITE AN ADVERSE RULING ON THIS ISSUE IN HIS PRIOR APPEAL.

Neither the District Court nor this Court is precluded, under the doctrine of *res judicata*, or any similar rule of repose, from adjudicating appellant's claim under 28 U.S.C. § 2255[33] that his trial could not proceed in his

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[31] (continued)

States ex rel. Carey v. *Rundle*, 409 F.2d 1210, 1213 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970); *cf. United States* v. *Bentvena*, 319 F.2d 916, 935 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949).

Like appellant's right to be present at the commencement of his trial, his "right to have the [meaningful] assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States*, 315 U.S. 60, 76 (1942).

[32] Appellant also alleged in his petition to vacate sentence that even assuming his presence at the commencement of trial was waivable, no legally sufficient waiver or competent finding of waiver was made in this case. App. 72-73. Although appellant believes that the procedure followed in determining that he knowingly and willfully relinquished his right to be present at trial was defective, *see Greenberg* v. *United States*, 280 F.2d 472 (1st Cir. 1960) (waiver may not be assumed from mere absence), that claim is not raised in this appeal.

[33] 28 U.S.C. § 2255 provides in pertinent part:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

absence merely because this issue was raised and decided adversely on his direct appeal from conviction. An outright refusal to reconsider *Tortora* flies in the face of the historic purposes of habeas corpus. In light of the panel's departure from long-standing law and practice,[4] a reexamination of that decision is imperative.

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[4] Although the exact question raised in *Tortora* had never before been squarely decided by this Court, prior decisions suggested a contrary result. For example, in *United States* v. *Crutcher*, *supra*, this Court remanded for further proceedings the conviction of a felony defendant who was absent during the impaneling of the jury. The Court rejected the Government's argument that noncompliance with Rule 43 was harmless error under *Chapman* v. *California*, 386 U.S. 18 (1967), stating that

> "the Court in *Chapman* also noted that some of 'our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.' [386 U.S. at 23.] A defendant's right to be present while the jury is selected would appear to be such a right. . . . [T]here is no way to assess the extent of the prejudice, if any, a defendant might suffer by not being able to advise his attorney during the impanelling of the jury." 405 F.2d at 244.

In *United States* v. *Partlow*, 428 F.2d 814, 815 (2d Cir. 1970), this Court observed that "[t]he Constitution does not require the court to discontinue *a trial once commenced* if the defendant has voluntarily absented himself. Federal Rules of Criminal Procedure, Rule 43, and Advisory Committee Note 2. . . ." (Emphasis supplied.)

While the language in *Crutcher* and *Partlow* can be read as *dictum*, it is significant, when weighing whether to revisit *Tortora*, that *Tortora* considers neither these decisions nor the considerable legislative history of Rule 43. *See* note 26, *supra*.

Since the decision in *Tortora*, this Court has ruled that a District Court lacks power to appoint counsel for fugitive defendants for the purpose of filing pretrial motions to dismiss indictments. *United States* v. *Weinstein*, 511 F.2d 622 (2d Cir.), *cert. denied*, 422 U.S. 1042 (1975). The Court reasoned that

> "in a criminal proceeding any action taken by the court at the behest of a representative appointed without the defendant's knowledge or consent could not bind the fugitive defendant." 511 F.2d at 628.

(footnote continued)

At common law "the inflexible doctrine of *res judicata*" [35] historically did not apply to habeas corpus actions. *Salinger* v. *Loisel*, 265 U.S. 224, 230 (1924). As the Supreme Court has stressed time and time again, habeas corpus

> "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963).

The motion to vacate sentence created by 28 U.S.C. § 2255 preserves the *habeas corpus* remedy and provides merely a more convenient forum in which to file a collateral attack upon a criminal conviction.

> "[The legislative history of § 2255] makes clear that § 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus. As the Court pointed out in *United States* v. *Hayman*, 342 U.S. 205, 219 (1952), the 'history of Section 2255 shows that it was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering

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[34] (continued)

Weinstein does not address the same issue presented in *Tortora*. It clearly contemplates, however, that certain proceedings may not be initiated or conducted without the accused's assent. This reasoning draws into question the sweeping statement in *Tortora* that "[l]ike any constitutional guarantee, the defendant's right to be present at trial may be waived." 464 F.2d at 1208.

While *Weinstein* may not rise to the level of an intervening change of law justifying relitigation of an issue previously considered on appeal, *see Davis* v. *United States*, 417 U.S. 333, 341-42 (1974); *United States* v. *Liguori*, 438 F.2d 663 (2d Cir. 1971); and *Crutcher* and *Partlow* are not in direct conflict with *Tortora*, the considerable ambivalence in this Circuit about this substantial legal issue is sufficient grounds alone to reexamine *Tortora*.

[35] *Wong Doo* v. *United States*, 265 U.S. 239, 241 (1924).

> the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.' Thus, there can be no doubt that the grounds for relief under §2255 are equivalent to those encompassed by § 2254, the general federal habeas corpus statute, under which relief is available on the ground that '[a person] is in custody in violation of the Constitution *or laws* or treaties of the United States.' (Emphasis added.)" *Davis* v. *United States*, *supra*, 417 U.S. at 343-44; *see also* *Kaufman* v. *United States*, 394 U.S. 217, 221-22 (1969).

Therefore, the doctrine of the inapplicability of *res judicata* in *habeas corpus* actions applies equally to § 2255 proceedings. Any other rule would run afoul of the Supreme Court's insistence that "adequate protection of constitutional rights requires the continuing availability of a mechanism for relief." *Kaufman* v. *United States*, *supra*, 394 U.S. at 226.

In establishing that *res judicata* does not apply to successive motions under § 2255, the Supreme Court has held that circumstances may arise in which a court can give controlling weight to a prior denial of relief. *Sanders* v. *United States*, 373 U.S. 1 (1963).[36] The rule is not one of jurisdiction but of the sound discretion of the District Court. Thus, in *Sanders* the Court stated:

> "Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255

[36] The *Sanders* rule also applies in those cases in which the original claim for relief is made by way of direct appeal rather than by collateral attack. *Kaufman* v. *United States*, *supra*, 394 at 227 n.8.

> relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." 373 U.S. at 15 (footnote omitted).

The Court elaborated on the third requirement:

> "Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground. . . . [T]he foregoing enumeration is not intended to be exhaustive; the test is 'the ends of justice' and it cannot be too finely particularized." 373 U.S. at 16-17.

In holding that it could not reexamine an issue raised and considered on appeal, the District Court relied on this Circuit's reputedly narrow construction of *Sanders*. *See, e.g., Kapatos* v. *United States*, 432 F.2d 110 (2d Cir. 1970), *cert. denied*, 401 U.S. 909 (1971); *United States* v. *Granello*, 403 F.2d 337 (2d Cir. 1968), *cert. denied*, 393 U.S. 1095 (1969); *Castellana* v. *United States*, 378 F.2d 231 (2d Cir. 1967). Nevertheless, in some of those decisions in which it announced a rule against reconsidering in a § 2255 motion issues previously raised on appeal, this Court has also stated that it in fact conducted an independent review of the record. In *Castellana* v. *United States*, *supra*, at 233, the Court stated that § 2255 may not "be employed to relitigate questions which were raised and considered on the appeal", but it also noted that

> "[w]e have, nevertheless, reviewed the record of the first trial which was before this Court on the initial appeal and given meticulous care to the points raised and the assertions which the appellants

appeared to make on this appeal." 378 F.2d at 232 n.3.

In *United States* v. *Thompson*, 261 F.2d 809, 810 (2d Cir. 1958), the Court made special reference to the fact that it had decided "to reexamine the record . . . because we wish to satisfy ourselves, since the earlier affirmance was by a different panel of this court."

Whatever may appear to be the rule in some reported decisions of this Circuit, it would seem that where justified this Court's practice has been to permit reconsideration of issues previously tendered for decision. In fact, this Circuit, along with others,[37] recognizes that § 2255 relief is proper in "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *United States* v. *Loschiavo*, 531 F.2d 659, 666 (2d Cir. 1976).[38]

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[37] *See, e.g., Robson* v. *United States*, 526 F.2d 1145 (1st Cir. 1975); *Konigsberg* v. *United States*, 418 F.2d 1270, 1273 (3d Cir. 1969), *cert. denied*, 398 U.S. 904 (1970); *Desmond* v. *United States*, 333 F.2d 378 (1st Cir. 1964); *DiAngelo* v. *United States*, 406 F.Supp. 880 (E.D.Pa. 1976).

[38] *Loschiavo* involved the question whether § 2255 relief was precluded because an issue was not squarely presented on appeal. Loschiavo, who was convicted of bribing a federal official, initially contested that the recipient of the bribe was a federal official, but he subsequently abandoned the claim. He apparently raised the issue on appeal, although not "squarely", and his conviction was affirmed without discussing the question. Loschiavo renewed this claim in his petition for writ of certiorari. On appeal from denial of Loschiavo's § 2255 motion, this Court held that the trial court had the discretion to vacate the conviction, despite the fact that the claim had not been properly presented on appeal.

Loschiavo points up the potential danger of an inflexible rule precluding review of issues raised on a prior appeal. If the "rule which requires resort to appellate procedure for the correction of errors 'is not one defining power but one which relates to appropriate exercise of power'", 531 F.2d at 666, quoting *Sunal* v. *Large*, 332 U.S. 174, 180 (1947), the same must therefore be true of the law governing renewal in a § 2255 motion of a question previously decided on appeal.

It is difficult to imagine a case presenting more exceptional circumstances than this one. Surely, the "ends of justice" require that the Court reconsider *Tortora* because it marks a stark departure from prior law and is at odds with the plain meaning and legislative history of Rule 43. If for no other reason, the compelling facts of this case—a defendant tried *in absentia*, convicted of all counts in a sixteen-count felony indictment, and incarcerated for almost five years on a 12-year prison sentence—obligate this Court to consider anew the claims raised in appellant's petition to vacate sentence.

CONCLUSION

In the recorded annals of federal jurisprudence, Samuel Santoro stands as the first defendant known to counsel to be convicted of a serious felony charge at a trial conducted entirely *in absentia*. In *United States* v. *Tortora*, *supra*, 464 F.2d at 1210 n.7, this holding was restricted to multiple-defendant cases. Clearly, the panel implicitly recognized that its decision was a major departure from the long-standing rule making an accused's presence at the commencement of a felony trial mandatory and nonwaivable. There can be no doubt that this precedent seriously threatens the interests of the individual defendant in a multi-defendant prosecution. Such fundamental interests as the defendant's right to be present at his own trial must not be frittered away by the charging process—a function wholly within the hands of the Government.

The result of the decision in *Tortora* is that Samuel Santoro is serving a twelve-year term of imprisonment after a trial at which he was not present and at which his interests were protected only by two attorneys who by their own admission were not sufficiently prepared to go forward without him. This is a case of manifest

injustice and one peculiarly appropriate for relief under 28 U.S.C. § 2255.

One of the proudest traditions of our criminal justice system has been the constant vigilance of the judiciary to protect the rights of the disadvantaged, the unpopular, the incompetent and even the foolhardy. Samuel Santoro does not ask for this Court's approval of his failure to honor his obligation to appear for trial. But what he does ask of this Court—like countless litigants in the past—is that the gravity of his offenses or the shamefulness of his conduct not forever disentitle him from receiving the benefits of the fair and even-handed administration of justice. Mr. Justice Murphy, dissenting from the removal from the Supreme Court's docket of the case of a Communist petitioner who had fled this country after oral argument, eloquently characterized the duty of this Court not to turn a deaf ear to the claims of this appellant:

> "Law is at its loftiest when it examines claimed injustice even at the instance of one to whom the public is bitterly hostile. We should be loath to shirk our obligations, whatever the creed of the particular petitioner. Our country takes pride in requiring of its institutions the examination and correction of alleged injustice whenever it occurs. We should not permit an affront of this sort to distract us from the performance of our constitutional duties." *Eisler* v. *United States*, 338 U.S. 189, 194-95 (1949) (Murphy, J., dissenting).

For the foregoing reasons, we respectfully request that this Court overrule *Tortora*, reverse the judgment of the

District Court and remand the case with directions to vacate appellant's conviction.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL SANTORO, Petitioner-Appellant,	:	
v.	:	No. 76-2125
UNITED STATES OF AMERICA, Respondent-Appellee.	:	

CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief for Petitioner-Appellant and the Joint Appendix and one copy of Petitioner-Appellant's Suggestion For Initial Hearing En Banc and supporting Memorandum of Points and Authorities were mailed to Michael D. Abzug, Esq., United States Department of Justice, New York Joint Strike Force, One St. Andrews Plaza, Third Floor, New York, New York, 10007, this 18th day of November, 1976.

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